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No. 868

# In the Supreme Court of the United States

OCTOBER TERM, 1958

ALONZO BULLOCK, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App.) is not yet reported. The opinion of the District Court is not reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1959. On March 23, 1959, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Stewart to and including April 28, 1959. The petition was filed on April 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the District Court had authority, four months prior to the hearing, to amend the order of attachment charging criminal contempt.

2. Whether the District Court correctly refused to order pretrial inspection by the defense of statements by prospective witnesses made to the Federal Bureau of Investigation.

3. Whether the jury was properly instructed on the necessity of proving an agreement between the petitioners and their co-defendant Kasper.

4. Whether the District Court properly instructed the jury with respect to the state of mind of the victim of the assault perpetrated by the petitioners.

5. Whether in a criminal contempt action the public, rather than any aggrieved private persons, is the real party in interest.

6. Whether the District Court erred in permitting the distribution to the jury of a handbook for jurors prepared under the authorization of the Judicial Conference.

7. Whether the District Court's determination that a juror was not influenced by a television program depicting him as a fair and impartial person is supported by the evidence.

8. Whether the court was right in holding that petitioners' actions contemptuous of court orders were not protected by the First Amendment.

9. Whether petitioners had knowledge of the injunction which they were charged with violating.

## STATUTE AND RULE INVOLVED

1. Rule 30, Federal Rules of Criminal Procedure:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct

the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

2. 18 U.S.C. 3500. *Demands for production of statements and reports of witnesses.*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be [redacted] directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court

in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

## STATEMENT

On January 4, 1956, the District Court for the Eastern District of Tennessee issued an order in *McSwain* v. *Board of Education of Anderson County*, 138 F. Supp. 570, directing the discontinuance of racial segregation in the high schools of Anderson County, Tennessee, by the fall term of 1956. Pursuant to the order, a number of Negroes were registered, and in August 1956, when school opened, 12 Negroes were enrolled in Clinton High School, Clinton, Tennessee (R. 25b).[1] On August 25, 1956, John Kasper, co-defendant below, arrived in Clinton and took various steps designed to oust the Negroes from the high school (R. 35b). A petition was filed in the District Court for injunctive relief, and on August 29, 1956,

[1] Pages cited as R. 1b, etc. refer to the Government's appendix filed in the Court of Appeals, and now filed as the record in this Court. Similarly, pages cited as R. 1a, etc. refer to petitioners' appendix, now on file in this Court.

that court issued a temporary restraining order enjoining John Kasper and others and "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them," from interfering with the carrying out of the desegregation order (R. 27a). Thereafter, after a hearing, a preliminary injunction issued and, after a further hearing, on September 6, 1956, the injunction was made permanent (R. 29a).

On December 5, 1956, the United States Attorney filed a petition charging the petitioners herein and others with criminal contempt for violating the injunction (R. 16a–18a). An order of attachment was issued by the court pursuant to this petition (R. 19a–22a). On February 25, 1957, the court issued an amended order of attachment which stated that the petitioners and others in active concert and participation with Kasper had violated the injunction by interfering with the desegregation order by (1) congregating in a threatening manner along the route to Clinton High School taken by the Negro students and intimidating these students from entering the school, and (2) vilifying, attacking and badly beating Reverend Turner when he escorted the Negro students to the school on December 4, 1956 (R. 22a–26a).

At the hearing had on July 8, 1957, it was shown that the petitioners had notice of the injunction (R. 12b–19b) and it was further shown that a concert of action existed between them and Kasper (R. 19b, 20b, 23b–24b, 28b–34b, 41b–48b, 62b–67b). Eivdence was adduced that every school-day morning between November 27 and December 3, 1956, several of the petitioners

congregated and stationed themselves in a threatening manner at a street intersection which the Negro children had to pass to get from their homes to the high school (R. 62b–65b). As a result, the Negro children did not go to school on those days.

On December 4, the petitioners and others again parked their cars in the area of the road leading from the Negro section to the school. Threatening remarks were made by several of the petitioners to the effect that they would prevent the Negroes from going to school (R. 36b, 52b). Later that morning, Reverend Paul Turner escorted the Negro children through the crowd to the school. On his way to school, Reverend Turner was threatened (R. 38b–40b, 48b–54b) and when he came back out, petitioner Cook and others struck him (R. 55b, 57b, 61b). In the course of the beating Turner went down on his knees and his head was bounced against the fender of a car (R. 57b). A mob was shouting "kill him" (R. 58b). Ultimately, the police arrived and Cook was arrested (R. 56b).

At the conclusion of the contempt hearing, the petitioners and Kasper were found guilty, while several co-defendants were acquitted (R. 72b). All of the petitioners were sentenced to probation for varying terms. Motions for a new trial were denied.

On February 27, 1959, the Court of Appeals affirmed the judgment of the District Court with respect to Kasper and the petitioners here.*

* Kasper, was sentenced to a term in prison. His conviction, like that of these petitioners, was affirmed by the Court of Appeals. Unlike these petitioners, he filed a petition for a rehearing in that court, which was denied on April 30, 1959.

ARGUMENT

1. It is contended, first, that the District Court erred in amending the original order of attachment. Petitioners apparently claim that the amended order charged a new offense and that this prejudiced their defense.

Rule 7(e) of the Federal Rules of Criminal Procedure provides that an information may be amended at any time before the verdict, if (1) no additional or different offense is charged and (2) the substantial rights of the defendants are not prejudiced.[3] Under the Rule, amendment is permitted up to the time of the verdict. In the instant case the amendment of the order of attachment took place over four months prior to the trial. Not only were the substantial rights of the petitioners not prejudiced by the amendment, but there actually was no cognizable injury of any kind; none is cited to this court.

Moreover, the amendment did not charge a new or different offense; criminal contempt was still the only charge made.[4] Petitioners were cited in both the original order and the amended one; only Kasper was added, and that modification occurred so long prior to

[3] Inasmuch as criminal contempt actions are *sui generis*, a standard of notice even less strict than that of Rule 7(e) may well be applicable. See *United States* v. *United Mine Workers*, 330 U.S. 258, 296, 297; *Reich* v. *United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004; *MacNeil* v. *United States*, 236 F. 2d 149 (C.A. 1), certiorari denied, 352 U.S. 912.

[4] For that reason, petitioners' reliance upon *United States* v. *Personal Finance Co.*, 13 F.R.D. 306 (S.D. N.Y.), is not well taken. In that case, unlike this one, the amendment charged violation of two wholly different sections of a regulation under the Defense Production Act than had been charged by the original information.

the hearing on the charges that no prejudice to anyone could possibly have resulted.

2. Petitioners question whether the District Court was justified in denying the request for a pretrial inspection of statements given to the Federal Bureau of Investigation by potential witnesses. Reliance is had on *Jencks* v. *United States*, 353 U.S. 657, as construed in *United States* v. *Hall*, 153 F. Supp. 661 (W.D. Ky.).

This issue is fully discussed in the Government's brief in *Rosenberg* v. *United States*, No. 451, this Term, at pp. 30-42. As there pointed out, the Court in *Jencks* was not concerned with pretrial inspection, and most of the courts which have had occasion to consider this question have concluded that such inspection is not compelled. See, *e.g.*, *United States* v. *Rosenberg*, 257 F. 2d 760 (C.A. 3), No. 451, this Term; *United States* v. *Grossman*, 154 F. Supp. 813 (D. N.J.); *United States* v. *Grado*, 154 F. Supp. 878 (W.D. Mo.); *Papworth* v. *United States*, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Benson*, 20 F.R.D. 602 (S.D. N.Y.); *United States* v. *Palermo*, 258 F. 2d 397 (C.A. 2), No. 471, this Term. The Senate Report on the bill designed to clarify the various lower court interpretations of *Jencks* indicates that the Judiciary Committee felt that any construction of *Jencks* requiring pretrial inspection was surprising inasmuch as the "overwhelming judicial thought * * * [is that *Jencks*] does not apply to pretrial production * * *." S. Rep. No. 981, 85th Cong., 1st Sess., Appendix, p. 8.

Beyond that, the "Jencks" Act, 18 U.S.C. 3500, *supra*, p. 3, explicitly provides that "* * * no statement or report * * * shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." In view of this clear prohibition on pre-trial discovery of such statements, and since any new trial would have to be held under the procedural rules laid down by Section 3500, it is unnecessary in this case to decide whether *Jencks*, taken by itself, would direct pre-trial discovery. See *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905; *United States* v. *Tomaiolo*, 249 F. 2d 683 (C.A. 2); *Papworth* v. *United States*, *supra*. Consideration of the claimed error in the light of the changed law does not violate the constitutional *ex post facto* prohibition. *Hopt* v. *Utah*, 110 U.S. 574; *Thompson* v. *Missouri*, 171 U.S. 380. See the Government's brief in *Lev et al.* v. *United States*, Nos. 435–437, this Term, at 65–67.

3. Petitioners maintain that the court erroneously refused to instruct the jury that the proof had to show agreements between Kasper and these petitioners during the months of November and December 1956. This claim is unclear. It may be that petitioners contend that the court refused to charge the jury as to the proof required of agreements to commit particular acts, *e.g.*, the assault on Reverend Turner or the congregating on the road to prevent the Negro children from entering the school; or the contention may be that the court refused to charge the jury as to the proof required of agreements to obstruct integration of Clinton High School in violation of the

injunction. On either hypothesis the point is without merit.[5]

First, it was not incumbent upon the Government to prove that there was a specific agreement to attack Reverend Turner, or to congregate on the road leading to Clinton School so as to intimidate the Negro children. On the contrary, the agreement which the Government proved, and which the court fully explained in the charge, was the agreement to hinder or obstruct desegregation of the Clinton school; this was the illegal agreement which was charged in the attachment order, and the only one pertinent to the case. The means whereby the petitioners and Kasper accomplished the illegal objective of the agreement did not have to be an advance part of the agreement. See *Glasser* v. *United States*, 315 U.S. 60; *United States* v. *Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664; *United States* v. *Klein*, 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924. In all probability, the precise means whereby petitioners obstructed the court order requiring integration of the Clinton school were not wholly formulated until the opportunity arose. Such means might well have to be proved, but not as part of the agreement. See *Braatelien* v. *United States*, 147 F. 2d 888 (C.A. 8).

[5] This was a case of criminal contempt of a court's order, not a criminal prosecution predicated on a conspiracy to commit a specified crime. The distinction between these two types of proceedings is explained in *Kelton* v. *United States*, 294 Fed. 491 (C.A. 3). Accordingly, the cases petitioners cite could hardly be in direct conflict with the decision of the Court of Appeals. In any event, as shown in the text, the court's charge imposed a burden of proof with respect to the agreements which fully complied with the strict requirements of a criminal prosecution.

Secondly, it cannot be seriously contended that the court refused to charge the jury as to the required proof of an agreement between Kasper and petitioners to obstruct and hinder the integration of the Clinton school. This element was explained to the jury several times in the charge. See R. 39a, 48a, 49a, 50a.

4. It is also claimed that the District Court erred when it charged that Reverend Turner's action of escorting the Negro children to the school was a "good deed." What the court did say was that *"From the standpoint of integration what he did was a well-intentioned contribution.* Now the jury is called upon to determine whether his being afterwards beaten had the retroactive effect of *undoing the good deed* done by him earlier in the morning" (R. 53a) (emphasis added). In context the statement was a proper comment on the evidence. See 9 Wigmore, *Evidence,* § 2551 (3d ed.). Additionally, when counsel objected to this portion of the charge, the court gave a supplemental instruction in which it stated, in pertinent part (R. 71b-72b):

> * * * I said to you in the course of the charge that from the standpoint of integration what Reverend Turner did was a well-intentioned contribution. *From the standpoint of segregation it might not be considered a well-intentioned contribution.* * * * If his intention had any bearing on that question, his intention on the occasion in question is a question of fact for the jury to determine * * * [Emphasis added].

After this supplemental instruction had been given, the court asked whether there were any further

objections to the charge, and counsel for petitioners replied in the negative. The present claim of error is therefore foreclosed by Rule 30, F.R. Crim. P.

5. Another contention is that the Negro children were the real parties in interest in this case and that the District Court erred in not instructing the jury that their failure to testify must give rise to an inference unfavorable to the Government.

The action here was for a criminal contempt. Its purpose was to vindicate the dignity of the court; it was a proceeding between the public and the petitioners. Private parties had no standing, and were not the real parties in interest. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418. Once a private party has informed the court of the facts which constitute contempt, the matter is out of his hands. *Kienle* v. *Jewel Tea Co.*, 222 F. 2d 98 (C.A. 7).

Furthermore, any right to request an absent-witness instruction must be predicated on a showing that the witnesses were peculiarly within the power of the party failing to produce. The mere issuance of a subpoena to a witness does not establish such exclusive control. *McGuire* v. *United States*, 171 F. 2d 136 (C.A.D.C.). A witness may be called by any adverse party deeming his testimony of importance. And if witnesses are available to both parties, it is not error to refuse to instruct the jury as to the inferences to be drawn from their absence. *Shurman* v. *United States*, 233 F. 2d 272 (C.A. 5); *United States* v. *La Rocca*, 224 F. 2d 859 (C.A. 2).

In any event, the testimony of these children with respect to the question of intimidation would at best

have been cumulative, since there was no charge that they had been intimidated other than by the public events which were testified to by many witnesses.

6. It is also urged that the District Court erred in permitting the distribution to the jury prior to trial of a pamphlet known as the "Handbook for Jurors Serving in the United States District Courts". The practice of distributing this booklet has been attacked in several circuits, but in no case has it caused a reversal. *United States* v. *Allied Stevedoring Corporation,* 258 F. 2d 104 (C.A. 2), certiorari denied, 358 U.S. 841; *United States* v. *Gordon,* 253 F. 2d 177, 184–5 (C.A. 7); *Horton* v. *United States,* 256 F. 2d 138 (C.A. 6); *United States* v. *De Marie,* 261 F. 2d 477 (C.A. 7). In the *Allied Stevedoring* case, *supra,* the court stated (at p. 107): "We find nothing improper in the use of the Handbook. In fact we believe that it accomplishes a necessary purpose and that its use should be encouraged." And, as the Court of Appeals here suggested, petitioners' objection came too late in any event since it was not made on the *voir dire.* See *United States* v. *Gordon, supra; United States* v. *Allied Stevedoring Corp., supra; United States* v. *Mathison,* 256 F. 2d 803 (C.A. 7), certiorari denied, 358 U.S. 857.

7. Another contention is that the District Court erred in refusing to grant a new trial because a juror viewed a television program in the course of which that juror was referred to as a citizen of honesty and integrity who could be depended upon to render an honest verdict.

The District Court found that the juror was not influenced in his verdict by reason of the program, and the Court of Appeals held that this finding was "amply supported by the evidence" (Pet. App. 29). The trial finding was made after a full hearing on the incident and after the court had reviewed the evidence with care and in detail (R. 156a–157a). In view of the innocuous nature of the broadcast, which reflected nothing more than local respect for the juror and faith in his honesty and integrity with regard to the trial, no other conclusion was possible. The facts cannot be so viewed as to compel disregard of both the discretionary power of the trial judge on a motion for a new trial and the determination of the Court of Appeals that he was right in his ruling. Cf. *Gicinto* v. *United States*, 212 F. 2d 8 (C.A. 8); *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (C.A. 2), certiorari denied, 353 U.S. 984; *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), certiorari denied, 335 U.S. 830; *Miller* v. *Commonwealth*, 40 F. 2d 820 (C.A. 6); see, also, 31 A.L.R. 2d 417.

Petitioners rely upon *Remmer* v. *United States*, 350 U.S. 377, apparently for the proposition that a presumption of prejudice exists. But *Remmer* dealt with *private* contacts with the jury which went to the merits of the case then on trial. Here, the medium of communication was public and did not touch on the merits or these petitioners. The general rule with respect to public media of communication was enunciated by Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245 at 251:

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.

When jurors happen to be exposed to radio reports, television programs, and newspaper articles concerning the trial—despite the admonitions by the trial judge—the facts must be aired thoroughly and the judge satisfy himself that in fact no prejudice existed. See the Government's brief in *Marshall* v. *United States*, No. 383, this Term. In this case, the trial judge complied with that rule, and there is no reason to overturn his findings which have been confirmed by the Court of Appeals.

8. Petitioners allege error in the appellate court's failure to pass on the question of whether or not the injunction was violative of the First Amendment. Actually, the court did decide this question (Pet. App. 15), citing the case in which it had previously passed on the same question involving the same injunction, *Kasper* v. *Brittain*, 245 F. 2d 92 (C.A. 6), certiorari denied, 355 U.S. 834. There, the court said (at p. 95):

> The right to speak is not absolute and may be regulated to accomplish other legitimate objectives of government. The First Amendment does not confer the right to persuade others to violate the law. Giboney v. Empire Storage Company, 336 U.S. 490, 502 * * *. The speech here enjoined was clearly calculated to cause a violation of law and speech of that character is not within the protection of the First Amendment. Dennis v. United States, 341 U.S. 494

* * *; Feiner v. People of State of New York, 340 U.S. 315 * * *; Beauharnais v. People of State of Illinois, 343 U.S. 250 * * *; Chaplinsky v. State of New Hampshire, 315 U.S. 568 * * *.

It is said by petitioners that "if this injunction is valid, then it is quite probable that freedom of speech is dead, particularly with respect to the integration issue pertaining to the High School in Clinton, Tennessee" (Pet. 19). It is difficult to understand how punishment for the contempt which the petitioners committed when they intimidated small children seeking their constitutional rights, and beat a minister who came to their aid, can rationally be viewed as a blow at free speech.

9. Finally, it is said that the court had no jurisdiction over petitioners because they lacked actual knowledge of the injunction. There is no substance to this contention.

Jurisdiction in actions for contempt for violation of injunctions is not restricted to the persons named or served with process in the suit in which the injunction was issued. *In re Lennon*, 166 U.S. 548, 554. Jurisdiction extends to any person who knowingly aids, abets, assists, or acts in active concert with the person who has been enjoined, and such person subjects himself to criminal as well as civil contempt for violating the injunction. *Reich v. United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004.

Petitioners' assertion that they did not have actual knowledge of the injunction is not supported by the facts. There was ample testimony that they were informed about the injunction and were requested not

to violate it (R. 6b–14b, 19b–21b, 34b–40b). The issue of actual notice was squarely put to the jury in the charge (R. 39a) and determined by them in their verdict.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959